86-184

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

PATRICK W. SIMMONS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED*

Whether the court of appeals erred in holding that Congress in 1980 by amending the carrier consolidation provisions of 49 U.S.C. 11344, intended to have the I.C.C. henceforth exclude consideration of the impact on persons employed by rail carriers not parties to the transaction, but who nevertheless would be adversely affected thereby, in determining if the transaction is in the public interest.

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*The list of all parties is set forth in No. 85-2133, following the Questions Presented therein.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cross-petitioner, Patrick W. Simmons,[1] respectfully prays that a writ of certiorari issue to review the judgment and the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Sixth Circuit are reported at *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (1986) and 787 F.2d 1031.[2] The decision of the Interstate Commerce Commission is not yet reported.[3]

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[1]Illinois Legislative Director for United Transportation Union.

[2]The opinions of the Court of Appeals are reproduced in the petition for writ of certiorari in No. 85-2133, at 1a-41a and 44a-46a, respectively.

[3]The agency's decision is reproduced in petition for writ of certiorari in No. 85-2133, at 47a-210a.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1986. Rehearing was denied March 28, 1986, as amended April 11, 1986.

This cross-petition for writ of certiorari is filed under Rule 19.5; the petition for writ of certiorari in No. 85-2133 was received June 27, 1986.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

The principal statute involved in this cross-petition for writ of certiorari is 49 U.S.C. 11344, and is set form below. The provisions prior to amendment in 1980 are set forth in the Addendum, *infra,* 1b.

§ 11344. Consolidation, merger, and acquisition of con trol: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the

Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase in consistent with the public interst. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

STATEMENT

This proceeding involves judicial review of the decision of the Interstate Commerce Commission ("I.C.C.") which approved acquisition of American Commercial Lines, Inc. ("ACL") by CSX Corporation ("CSX").

The I.C.C.'s approval was made under two statutes, section 11 of the Panama Canal Act of 1912, 49 U.S.C. 11321, and section 11344 of Title 49 U.S.C. (1982 ed. Supp. II).

The petition in No. 85-2133 focuses on the Panama Canal Act of 1912. On the other hand, this cross-petition is directed solely to the carrier consolidation provisions of 49 U.S.C. 11344, and, in particular, whether the I.C.C. is required to consider the interest of all rail employees (not just CSX rail employees) in determining whether to approve the CSX-ACL affiliation.

This cross-petition is not conditional. This cross-petition should be considered whether or not the Court grants certiorari in No. 85-2133.

The CSX-ACL affiliation is projected to divert some rail freight business from the lines of rail carriers not in the CSX family. The I.C.C.'s report gave examples of coal, grain, and phosphate/potash shipments, handled jointly by CSX rail lines and non-CSX rail lines, which may be diverted to CSX-ACL routes. (No. 85-2133, 57a-59a). However, the I.C.C. ruled that the effect of the CSX-ACL proposed transaction upon the employees of non-CSX carriers no longer could be considered in determining whether the transaction should be approved. The I.C.C. acknowledged that until recently it considered the impact of a transaction upon the employees of all carriers, including water carriers, in passing upon rail-water acquisitions. (No. 85-2133, 84a):

> In past decisions approving rail-water consolidations, the Commission has interpreted former section 5(2)(f) as applying only to railroad employees, but has considered the interest of other carrier employees under the public interest criteria applicable to consolidations and has concluded that it had discretionary authority to impose conditions for the benefit of those employees. *See Federal Barge Lines, Inc., Purchase,* 285 I.C.C 439, 447 (1953); *Baltimore Steam Packet Co. Acquisition and Control,* 244 I.C.C. 583, 603-4 (1941). The Commission based this analysis on the former generally applicable consolidation criteria that required consideration of the interest of carrier employees affected by the proposed transaction. Under those criteria, therefore, the Commission had an obligation to consider the impact of a transaction on water carrier employees."

The I.C.C. contended that Staggers Rail Act of 1980[4] eliminated consideration of employee impacts from the agency's decision process whether to approve a transaction, if the proceeding did not involve the merger or control of at least two Class 1 rail carriers. Prior to 1980, 49 U.S.C. 11344(c) provided one general standard for all carrier consolidations — "consistent with the public interest"— subject to additional requirements for rail-motor consolidations, but under subsection 11344(b) consideration had to be given to at least four named criteria, one being the impact on railroad employees. 49 U.S.C. 11344(a)-(c) (1976 ed. Supp. II).

Staggers Rail Act of 1980 added a fifth criterion to subsection 11344(b), but confined subsection 11344(b) to

[4]P.L. 96-448, section 228; 94 Stat. 1931-32 (1980).

proceedings involving the merger or control of at least two class 1 rail carriers. All other proceedings – which embrace CSX-ACL since two class 1 rail carriers are not deemed involved – are governed by a new subsection 11344(d), which requires the I.C.C. to approve an application unless it finds that (1) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Thus, based upon its interpretation of the 1980 amendments to 49 U.S.C. 11344, the I.C.C. in passing upon the CSX-ACL transaction did not consider the impact upon employees of non-CSX rail carriers suffering a diversion of traffic from the CSX-ACL transaction. In short, the I.C.C. found the "consistent with the public interest" standard of subsection 11344(c) to be inapplicable, and found the "public interest" of subsection 11344(d) not to embrace employee impacts, even though the I.C.C. in its CSX-ACL decision made a public interest finding under subsection 11344(d). (No. 85-2133, 157a).

The I.C.C. did impose the mandatory employee protective conditions for employees under 49 U.S.C. 11347, but only for CSX rail employees. (No. 85-2133, 83a-84a, 149a, 149a-51a, 157a-58a).

Court of Appeals Opinion

The Court of Appeals sustained the I.C.C.'s rejection of employee concern coming within the "public interest," but on somewhat different grounds. The Court pointed to subsection 11344(b)'s requirement for the I.C.C. to con-

sider the impact on all carrier employees, but found the CSX-ACL transaction governed instead by subsection 11344(d), which requires only that the I.C.C. consider the public interest. The court of apeals stated that since subsection 11344(b) also requires consideration of the public interest, in addition to the effect on employees, Congress did not contemplate that the term "public interest" in subsection 11344(d) to include concern about effect on employees. 781 F.2d at 1192. (No. 85-2133, 24a):

> "Section 11344(b), however, is expressly restricted to mergers involving at least two class I railroads. *Detroit, Toledo & Ironton* involved such a merger. The instant case does not. The instant case is subject to the provisions of section 11344(d), covering mergers other than of class I railroads. Section 11344(d) does not contain a requirement similar to section 11344(b)'s requirement to consider the impact on all carrier employees. Section 11344(d) requires only that the Commission consider the public interest. Since section 11344(b) also specifically requires consideration of the public interest, in addition to consideration of the effect on employees, *we conclude that Congress did not contemplate that the general notion of "public interest" included the concern about effect on employees. [Emphasis supplied]*

The court of appeals added that two Supreme Court decisions do not support the view that "public interest" includes the interest of railroad employees not directly affected. 781 F.2d at 1192. (No. 85-2133, 25a):

> Simmons argues that *I.C.C. v. Railway Labor Association,* 315 U.S. 373 (1942), and *United States v. Lowden,* 308 US. 225 (1939), hold that, as a matter of law, the general term "public in-

> terest," in railroad transactions, includes the interest of railroad employees. We find that *Railway Labor* and *Lowden* are inapposite. Each case basically held that because the Commission had authority to impose conditions in furtherance of the public interest, it could impose restrictions designed to protect the employees of railroads directly involved in transactions requiring Commission approval. Neither case goes on to hold that "public interest" necessarily includes the interest of employees not directly affected. We hold that the Commission was not required to consider the interests of such employees in the instant transaction.

Cross-petitioner filed his separate petition for rehearing, which was deemed denied March 28, 1986, as amended April 11, 1986. 787 F.2d 1031. (No. 85-2133, 44a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

I. THE COURT OF APPEALS ERRED IN RULING THAT RAILROAD EMPLOYEES CANNOT BE CONSIDERED PART OF THE "PUBLIC INTEREST" UNDER 49 U.S.C. 11344(d).

The holding of the Court of Appeals that railroad employees are not within the "public interest" of subsection 11344(d) is not supported by statutory language or legislative history.

Contrary to the opinion of the Court of Appeals, it is subsection 11344(c) which contains the "public interest" standard governing I.C.C. consideration of proposals in-

volving the merger or control of at least two class 1 rail carriers. Subsection 11344(b) does not specifically require consideration of the "public interest" in addition to consideration of the effect on employees. The text of subsections 11344(b) and 11344(c) are quite clear in this regard. The only mention of "public interest" in 49 U.S.C. 11344(b)(1) is "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction." Subsection 11344(b) does not set forth a general "public interest" standard. Rather, such public interest standard is specified in subsections 11344(c) and 11344(d).

When Congress in 1980 required that the five criteria of subsection 11344(b)(1) be considered by the I.C.C. in determining the public interest under subsection 11344(c), where merger or control of at least two class 1 railroads is involved, Congress could not be presumed to mean the I.C.C. should *exclude* any of the five criteria when determining the public interest under subsection 11344(d), involving transactions other than the merger or control or two class 1 railroads. The public interest under subsection 11344(d) does not explicitly *require* the I.C.C. to consider any specific named criteria under the public interest. The meaning of the term is obviously dependent upon the facts presented and the issues raised in particular proceedings.

There is nothing in the legislative history of Staggers Rail Act of 1980 to indicate that the I.C.C. no longer is to consider railroad employees as a factor in the "public interest" when the issue is properly raised. The Court of Appeals simply misread the statutory provisions, which are clear on their face.[5]

[5]The opinion of the Court of Appeals does recognize that the "public interest" of subsection 11344(d) is involved in the instant CSX-ACL transaction, and the I.C.C. did make a finding on this score. (No.

Congress in eliminating the requirement for the I.C.C. to consider the five specific criteria of subsection 11344(b)(1) in cases not involving the control or merger of at least two class 1 rail carriers, did not mean to exclude such criteria where appropriately raised under sub-section 11344(d). The aim of Congress was to expedite the processing of smaller transactions by the I.C.C.H. Rept. No. 96-1430 (Conf.), 120-21 (1980).

II. THE COURT OF APPEALS ERRED IN CONFINING THE PUBLIC INTEREST IN EMPLOYEE IMPACTS TO THOSE EMPLOYEES DIRECTLY AFFECTED.

The Court of Appeals erred in ruling the I.C.C. was not required to consider the impact of a transaction upon non-CSX employees, citing *I.C.C. v. Railway Labor Association,* 315 U.S. 373 (1942) and *United States v. Lowden,* 308 U.S. 225 (1939). In short, even if the transaction did involve two class 1 rail carriers, the Court of Appeals would find the I.C.C. is not required to consider the interest of non-CSX rail carrier employees under the public interest standard in approving the transaction. The ruling of the Court of Appeals is important in this subsection 11344(d) case, since it is the non-CSX rail carrier employees, not qualifying for the mandatory 49 U.S.C. 11347 employee protective conditions, whose interest has not been considered.

The decision would seem contrary to the Court of Appeals for the Fifth Circuit, wherein it was held the impact

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85-2133, 157a). In situations where the I.C.C. does not reach the public interest under subsection 11344(d), another court of appeals has taken more restrictive approach, with which this petition disagrees. *People of State of Ill.* v. *I.C.C.*, 687 F.2d 1047 (7th Cir. 1982).

on all rail carriers is to be considered as part of the broad public interest, in passing on the proposal, but that only the applicants' employees are granted protective conditions. *Missouri-Kansas-Texas R. Co. v. United States,* 632 F.2d 392, 411 (5th Cir. 1980), cert. den. 451 U.S. 1017:

> In the BN-Frisco opinion, the Commission considered the effect of the merger on all carrier employees as part of its broad view of the public interest under 11344(c). But only the employees of BN and Frisco were granted actual protection in the Commission's order.

Moreover, the Court of Appeals has not correctly understood the opinions of this Court in *I.C.C. v. Railway Labor Association supra,* and *United States v. Lowden, supra.* Certainly the impact of a rail transaction upon the employees of rail carriers not parties to the transaction, but suffering diversion of traffic, is part of the public interest to be considered by the I.C.C. in determining whether to approve the transaction. This Court recognized the role of employees in carrying out the national transportation policy, and in maintaining an adequate and efficient transportation system, in *United States v. Lowden,* 308 U.S. at 234:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

The Court added concerning transportation efficiency (*Id.* at 235-36):

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, bur that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Clearly, the impact upon rail employees, direct or indirectly affected by the transaction, is a matter of the public interest and must be considered by the I.C.C. when appropriately raised in its proceedings under 49 U.S.C. 11344(d).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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ADDENDUM

FORMER 49 U.S.C. 11344

§11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commision may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with thepublic interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.